Supreme Court, U.S.
FILED
MAR 2 8 2000

(2)

No. 99-1419

In The

Supreme Court of the United States

NEW YORK CITY, MARVA LIVINGSTON HAMMONS, as Commissioner of Social Services of the City of New York, and CLAUDE MEYERS, as Deputy Commissioner of Social Services of the City of New York,

Petitioners,

-against-

MARC TENENBAUM and MARY TENENBAUM, individually and on behalf of SARAH TENENBAUM, an infant,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CAROLYN A. KUBITSCHEK
Counsel of Record
LANSNER & KUBITSCHEK
325 Broadway, Suite 201
New York, New York 10007
(212) 349-0900

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS AND OF THE CASE 1

Procedural History 1

Facts 3

REASONS WHY THE PETITION SHOULD BE DENIED 11

A. The Petition presents questions of fact, which are not appropriate for this Court 11

1. The removal of Sarah Tenenbaum from her parents 11

2. The search of Sarah Tenenbaum's body 13

B. Neither the decision below nor the record raises the questions presented 15

1. The removal of Sarah Tenenbaum from her parents 15

2. The search of Sarah Tenenbaum's body 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 20

Armstrong v. Manzo, 380 U.S. 545 (1965) 19

Catanzaro v. Weiden, 140 F.3d 91 (2d Cir. 1998) 11

Chalkboard, Inc. v. Brandt, 902 F.2d 1375 (9th Cir. 1990) 11

Croft v. Westmoreland County, 103 F.3d 1123 (3rd Cir. 1997) 16

Davis v. United States, 417 U.S. 333 (1974) 20

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1976) 17

Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 11, 17

Malik v. Arapahoe County Department of Social Services, 191 F.3d 1306 (10th Cir. 1999) 16

Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999) 16

Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991) 11

Monell v. Department of Social Services, 436 U.S. 658 (1978) 1

Santosky v. Kramer, 455 U.S. 745 (1982) 16

Stanley v. Illinois, 405 U.S. 645 (1972) 16

van Emrik v. Chemung County Department of Social Services, 911 F.2d 863 (2d Cir. 1990) 20

Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987) 16

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000) 17

Zinermon v. Burch, 494 U.S. 113 (1990) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 1
N.Y. Fam. Ct. Act § 1022(a) 9
N.Y. Fam. Ct. Act § 1027(a) 9
N.Y. Soc. Serv. L. § 423 4
N.Y. Soc. Serv. L. § 424(11) 5

OTHER AUTHORITY

New York State Central Register Reporting Highlights 1974-88 5

STATEMENT OF FACTS AND OF THE CASE

Procedural History

Petitioners' statement of facts, which is very much skewed toward their point of view, neglects to inform this Court that the facts are very much in dispute because of the procedural posture of the case. Indeed, Petitioners have entirely omitted the procedural posture of the case from their discussion.

Respondents Marc, Mary, and Sarah Tenenbaum, who were the plaintiffs in the District Court, sued the City of New York and several of its child welfare employees and officials under 42 U.S.C. § 1983. The Tenenbaums claimed that the defendants violated their constitutional rights based upon two separate incidents. First, defendants removed five-year-old Sarah from the custody of her parents shortly before noon on January 9, 1990. (A12)[1] Second, defendants subjected Sarah to a search, in the form of an intrusive gynecological examination, on the afternoon of the same day. (A12) Defendants did not seek or obtain court orders for either of those actions. (A4)

The District Court stayed discovery on plaintiffs' claims against the City and its Commissioners, the so-called "Monell claims." (A63) See, *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Discovery proceeded only as to the individual defendants – child welfare caseworker Veronica James and her supervisor Nat Williams, who are not parties in this Court. At the conclusion of

---

[1] "A" refers to pages in the Appendix to the Petition for a Writ of Certiorari.

discovery, all defendants moved for summary judgment, despite the absence of discovery as to the City of New York and its Commissioners. (A63)

The District Court granted the defendants' motion for summary judgment on all of the plaintiffs' claims regarding defendants' removal and detention of Sarah Tenenbaum. (A13) The court found that the individual defendants were entitled to qualified immunity on the claims regarding the search of Sarah's body. (A13) However, the court denied the motion as to the plaintiffs' claims against the City and Commissioners, and directed that that portion of the lawsuit proceed. Contrary to Petitioners' statement (P8)[2], the District Court did *not* grant summary judgment in favor of plaintiffs on any issue. (A13)

When the Tenenbaums sought discovery on the *Monell* claims regarding the search of Sarah's body, Petitioners stipulated that they have a policy of conducting searches of children – in the form of medical examinations – for purely investigative purposes. (A14, A24) Thus, the City conceded liability on the search of Sarah, at least for the purposes of the present litigation. The case went to trial on damages only. (A14)

On appeal, the Second Circuit affirmed the District Court on all questions involving the search of Sarah Tenenbaum's body. (A5) The Second Circuit reversed the District Court's grant of summary judgment to defendants on plaintiffs' claims regarding the removal of Sarah Tenenbaum from her parents. (A5) The Second Circuit

---

[2] "P" refers to pages in the Petition for Writ of Certiorari.

ruled that the individual defendants had qualified immunity on the claims that they violated the Constitution in removing Sarah from her parents without due process of law. (A5) With regard to the Tenenbaums' claims against the City and its Commissioners for the unconstitutional separation of the parents and child, the Second Circuit found that "a properly instructed jury could conclude that at the time the caseworkers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah's safety, to seek a court order." (A19) Accordingly, the Second Circuit remanded, for further proceedings, the Tenenbaums' claims against the City and Commissioners regarding the removal of Sarah. (A44) The Second Circuit has stayed its mandate pending the outcome of the case in this Court.

Thus, there are two separate claims: the claims against the City for the search of Sarah Tenenbaum, which have been litigated to conclusion, and the claims against the City for the removal of Sarah from her parents, which are still in the discovery stage.

Facts

Employees of Petitioners City of New York, Hammons, and Meyers removed Sarah Tenenbaum, a developmentally delayed five-year-old girl (A6), from her parents and subjected her to a body cavity search (A12) as a result of a discredited allegation (A12) against her father only, made by an inexperienced teacher. Sarah was removed, not to protect her from immediate danger (A28), but in order to conduct an investigatory search (A27) of her most private body parts. The course chosen by Petitioners

– having a stranger summarily remove the girl from school and take her to a city hospital emergency room – was the most traumatic method of obtaining information (see A27), the most intrusive and least observant of constitutional rights (see A26), and was nothing more than a shocking display of raw governmental authority. Acting pursuant to standard City procedure (A11), the City employee who decided to remove and search Sarah, and the caseworker who carried out the removal and search, did not seek or obtain judicial approval for either the removal or the search (A12), although they had ample time to do both. (A19, A28)

The events began on Friday, January 5, 1990, when the New York State Central Register of Child Abuse and Maltreatment (the "Register") received a telephone complaint of suspected child abuse regarding plaintiff Sarah Tenenbaum, then five years old, from Susan Raiten, a guidance counselor at Sarah's school. (A7) The same day, the Register faxed a written version of the complaint to New York City's Child Welfare Administration ("CWA") (A7). The written document said that "Sarah is speech and language delayed. Sarah unable to stay awake during the day. Ch[ild] is nervous and withdrawn. Ch[ild] is afraid of fa[ther]. Fa[ther] hurts her vaginal area at night." (A7) The Register designated plaintiff Marc Tenenbaum, Sarah's father, as the alleged perpetrator. Sarah's mother, plaintiff Mary Tenenbaum, was not listed as a perpetrator. (A90)

N.Y. Soc. Serv. L. § 423 requires that every complaint of suspected child abuse or maltreatment which the Register receives must be fully investigated. Defendant Nat Williams, a supervisor with CWA, was assigned to the

Tenenbaum investigation, and he in turn assigned defendant Veronica James to carry out the investigation. (A7) Neither Williams nor James are parties in this Court.

Williams and James had many reasons to treat the report with a degree of skepticism. In the State of New York, approximately two-thirds of the complaints which the Register receives turn out, upon investigation, to be completely groundless or "unfounded," i.e., not supported by any credible evidence whatsoever. N.Y. Soc. Serv. L. § 424(11); *New York State Central Register Reporting Highlights 1974-88*, Table 10 (reproduced in Joint Appendix to Second Circuit, pp. A.171-73) Moreover, they did not know whether the informant was reliable.

Contrary to the implication of Petitioners' statements (P5-6), Sarah's problems in school were a direct result of her developmental delays and not of any sexual abuse. Sarah's teacher Mary Murphy, a second-year teacher, was not sufficiently experienced to recognize that Sarah should never have been placed in a mainstream kindergarten class or to realize that that error was the cause of her problems in school.

If Williams was skeptical, he concealed his reservations from James. When he assigned the Tenenbaum complaint to James, Williams told her to investigate Marc Tenenbaum for possible sexual abuse of his daughter, but instructed her to conceal that allegation from both of the Tenenbaums. (see A8)

On Friday, January 5, 1990, Williams sent caseworker Tom O'Connell with James to the Tenenbaum home. (A8) Both of the Tenenbaums were home, as were Sarah and

her younger brother Aaron. (A8) James told the Tenenbaums that CWA had received a report that Sarah was sleeping in school and was developmentally delayed. (A8) Marc Tenenbaum explained that the family had an ongoing dispute with the school over plans for Sarah's education. (A60) The Tenenbaums had initially questioned, and recently vetoed, the school's plans to transfer Sarah to a Special Education class in a different school. Moreover, concerned about Sarah's development, the Tenenbaums had obtained comprehensive evaluations and treatment for Sarah's developmental problems at Maimonides Hospital. (A60) Those problems included elective mutism, the inability to speak outside the home. (A6)

The Tenenbaums thus definitively refuted any charges that they were neglecting Sarah's educational or developmental problems, specifically disproving the school's charges. (A60) In addition, the Tenenbaums demonstrated a motive on the part of school staff to misjudge the family, whom the school found insufficiently deferential. (A60)

The Tenenbaums informed James about the children's health and, when requested, signed releases for their doctors' records. (A8) They gave James a tour of the house. James found the house neat and well cared for. (A8)

Although James had the power to remove children in emergency situations, she left Sarah at home when she departed from the Tenenbaum home (A8), obviously concluding that Sarah was in no immediate danger. Despite

the availability of emergency caseworkers, CWA took no further action over the weekend. (A9)

On Monday, January 8, 1990, James went to Sarah's school (A9) and learned for the first time that the person who had allegedly heard of the sexual abuse from Sarah was not Raiten but Mary Murphy, Sarah's kindergarten teacher. (A9) Murphy reiterated what had happened the week before: from Sarah's nodding, in response to a series of leading questions, Murphy felt that she had ascertained that Sarah was being bothered by something at home related to her father. (A6, A9) Sarah had also been playing with a doll; and when Murphy approached her to ask her where, on the doll, Sarah was being hurt, Sarah pointed to the doll's groin area. (A6) Not once did Sarah utter a word to Murphy. (A6)

By the time James came to the school for investigation, she knew that Sarah suffered from elective mutism. (See A7) That fact alone should have caused James to question the veracity of Murphy's claim that Sarah had "told" Murphy about sexual abuse on the previous Friday. Moreover, James knew or should have known that young children are extremely suggestible and, in responding to leading questions, are likely to give answers that they believe the adults want to hear.

James then questioned Sarah about the alleged abuse. (A9) Sarah did not answer any of her questions. (A9) In fact, she did not speak to James or Murphy. (A9) Undeterred, James asked Murphy to recreate the events of the prior Friday and to show James exactly what Murphy had done to obtain answers from Sarah. (A9) The rerun of the experiment yielded results contrary to those that Murphy

had supposedly observed on Friday. When Murphy asked Sarah, in front of James, whether Sarah's father touched her near the vagina and hurt her, Sarah shook her head "No." (A9) Thus, James had even less reason to believe that Sarah had been abused than she had before the visit. (A9)

Although the Tenenbaums had signed releases, James and Williams made no attempt to speak to Sarah's pediatrician about possible abuse. Nor did they examine Sarah's school records, which documented her developmental delays. Instead, when James advised Williams what had happened at school, including the fact that Sarah had responded negatively to questions about sexual abuse (A9), Williams told James to remove Sarah from school the next day (Tuesday) and bring her to Coney Island Hospital to be examined for sexual abuse. (A10)

While Williams instructed James on Monday afternoon to remove Sarah. (A10), neither Williams nor James saw any need to proceed with the removal that afternoon, from either the school or home, nor to have Petitioners' Emergency Children's Services unit make a removal in the evening or nighttime. (A10) Petitioners misstate the facts in claiming that Williams waited until Tuesday to make the decision to remove Sarah (P21) and that the situation changed between Monday and Tuesday. (P21)

While Petitioners argue that when the decision was made is unclear and not relevant (P22 n1), the testimony of both Williams and James shows that the decision was made on Monday afternoon. (A10) Although Petitioners argue that it takes more than a day to get a court order

(P28), the City has conceded that they could get an order the same day (A11 n7), and Williams knew that. (A11)

Petitioners' attempt to justify Williams' decision (P20-22) has required them to invent facts which do not exist. They seek to justify his delay in acting on an "emergency" by claiming that he was waiting for a call from the parents. (P21) They seek to buttress his decision by claiming that an important element in that decision was his perception "that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him." (P22) Petitioners completely omit the fact that, as both sides admitted below, the Tenenbaums were not aware of any such allegation. (A8) The caseworkers who had the sole contact between CWA and the Tenenbaums, at a visit to the home on Friday night, had concealed from the Tenenbaums, at Williams' explicit instructions, all information that the report concerned alleged sexual abuse. (A8) Thus, Petitioners seek to justify Williams' actions by the failure of the Tenenbaums to respond to information that Williams had withheld from them. (P21, A10 n4)

Williams did not seek judicial authorization prior to removing Sarah, despite the fact that New York law requires CWA to do so. N.Y. Fam. Ct. Act §§ 1022(a); 1027(a). Moreover, Petitioners concede that those steps can be accomplished in one day. (A11 n7) Despite constitutional and statutory requirements to do so, Williams stated that he had rarely gone to court before removing a child. (A11) City policy was to remove children first, and seek court orders later.

On Tuesday morning, January 9, 1990, James removed Sarah from school. (A12) James took Sarah to Coney Island Hospital, where they waited three or four hours because James, in accordance with CWA practice, had not made an appointment. (A12) Finally, Sarah was seen and subjected to two examinations, one by a pediatrician, the other by a gynecologist. Sarah was stripped and subjected to a body cavity search, including an inspection of her vagina and surrounding area, as well as penetration of her vagina and anus with Q-tips. (A12) That was the first time in her life that Sarah had undergone a gynecological exam. (Mary Tenenbaum Trial Transcript, p. 10, reproduced at Joint Appendix in Second Circuit, p. A.532) No evidence of sexual abuse was discovered. (A12)

Several hours after Sarah was removed from school and while she and James were at the hospital, Williams contacted Mary Tenenbaum. (A12) Mrs. Tenenbaum left her job immediately and went to Williams' office, stopping only to call her husband. (A12)

Williams stated that CWA had taken Sarah and that the Tenenbaums would not get Sarah back. (A62) When Mary Tenenbaum defended her husband, Williams told her that she was an unfit mother. (A62)

Eventually, James returned from Coney Island Hospital with Sarah and the doctors' report. (A62) Williams reviewed the report and decided not to make a charge of sexual abuse. (A62) In fact, the City determined that the allegations of sexual abuse were "unfounded," i.e., that there was no credible evidence to support them. Between

7:30 and 8:30 PM, Williams released Sarah to the Tenenbaums. (A12)

The City conceded that it had a standard practice of performing medical examinations on children whom they had removed, to investigate for possible abuse, without seeking prior approval from a court. (A11, A24)

REASONS WHY THE PETITION SHOULD BE DENIED

A. The petition presents questions of fact, which are not appropriate for this Court.

1. The removal of Sarah Tenenbaum from her parents

The first question for review, when stripped of all the excess verbiage, is: was Sarah Tenenbaum's situation an emergency? As Petitioners themselves stated, "The relevant question is whether there is an 'emergency' at the time the decision is made to remove a child." (P22-23) That question is one of fact, and is therefore inappropriate for this Court. *Jordan v. Jackson*, 15 F.3d 333, 347 (4th Cir. 1994): "Whether the child is subject to imminent danger to his life or is in imminent danger of irreparable injury to his health is a sharply focused factual determination . . . "; *Catanzaro v. Weiden*, 140 F.3d 91, 94 (2d Cir. 1998): "the existence *vel non* of an emergency is an issue of material fact . . . "; accord, *Miller v. Campbell County*, 945 F.2d 348, 353 n. 8 (10th Cir. 1991); *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1990): the question as to whether an emergency existed, which vitiated the pre-

deprivation hearing requirement of due process, could not be resolved on summary judgment.

A close reading of the petition for certiorari itself demonstrates the fact-sensitive nature of this particular case. Petitioners cannot even agree among themselves as to what constitutes an emergency. They conceded at oral argument in the Second Circuit that they could have gotten a court order the same day. (A11 n7) Indeed, Williams had testified that he could file papers in court, present a case to a judge, and obtain judicial approval (or disapproval) within one day. (A11, A61, A68) Nevertheless, Petitioners now say that they would have to wait several days to get a court order, and that would be harmful to children. (P28) That assertion is belied by the record below and is simply a scare tactic.

The law is clear that when the government seeks to deprive an individual of liberty, the government must provide due process of law in the form of a pre-deprivation hearing. The state must provide a pre-deprivation hearing, i.e., a hearing before the removal of the child, whenever the state "feasibly can provide" one. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Indeed, Petitioners concede that only in " 'emergency' circumstances" may the City act "without either parental consent or a prior court order." (City Reply Brief to Second Circuit p. 36)

In arguing that the "emergency" still existed on Tuesday even if they did not make the removal on Monday (P21), Petitioners miss the point of the Second Circuit's decision: the decision not to remove Sarah on Monday gave them sufficient time to provide a pre-deprivation hearing, i.e., to go to court to seek an order.

Petitioners' attempt to justify the decision to seize Sarah (P20-21) has required them to invent facts. They seek to justify Williams' delay in acting on an "emergency" by claiming that he was waiting for a call from the parents. (P20-21) They also seek to buttress Williams' decision by claiming that he had more information on Tuesday, which constituted an important element in his decision, to wit: his perception "that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him." (P21) Petitioners completely omit the fact, which was admitted by both sides, that the Tenenbaums were never aware of any such allegation.

The procedural protections afforded by Due Process clause of the Fourteenth Amendment are not for the benefit of parents only. Most importantly, those procedural protections benefit the children. Contrary to Petitioners' assertions, removing children from parents is not a safer course. As the District Court found, Sarah was "abused" by the examination and suffered trauma. The same was true of her removal from school and home.

Removing a child without due process is not a "safer course." The District Court found that Sarah suffered psychological injury as a result of the examination. (A27) The same was true of her removal from school and parents.

2. The search of Sarah Tenenbaum's body

Petitioners now claim that their search of Sarah Tenenbaum's body, in the form of a gynecological examination, was justified under the Constitution because it "was

not merely forensic but was also medical" (P26), i.e., because Sarah might have needed medical treatment. (P25, P26) That argument must fail for two reasons.

First, Petitioners never claimed such a justification in the District Court. (A101) On the contrary, as the District Court found, "no claim has been advanced, directly or indirectly, that the examination was related to necessary medical care or treatment of the child. . . . " (A101) Rather, the exam was "solely for investigative purposes" (A74); "Williams unambiguously so testified." (A27) In claiming that the exam was for medical as well as investigative purposes, Petitioners impugn the motives of their own employee who ordered that exam. They also have tried to invent facts that do not exist.

Second, Sarah's parents were perfectly capable of obtaining medical treatment for her if she needed it. Her mother, a nurse, would have been a far better person to accompany Sarah than defendant Veronica James, who was a stranger to the child. Likewise, it would have been better for Sarah to be examined by her own pediatrician, whom she knew and trusted, than by a strange male doctor. Finally, if Sarah had actually needed medical treatment, Petitioners' four-day delay in obtaining that treatment was all the more inexcusable.

Petitioners' closing argument, that they must choose between performing examinations or not protecting children, is false and confuses the issue. (P30-31) The choice is not theirs to make, but rather lies in the sound judgment of a neutral magistrate. Providing due process of

law to all persons, is the best way to safeguard individuals from overzealous investigators and the resultant disruption of family autonomy.

B. Neither the decision below nor the record raises the questions presented.

1. The removal of Sarah Tenenbaum from her parents

Petitioners claim that they removed Sarah because the situation was an emergency, or rather that their employee Nat Williams "reasonably perceived" the situation as an emergency. (P21) The facts do not raise that issue.

The only Petitioners here are the City of New York and its Commissioners – Marva Hammons and Claude Meyers. None of the Petitioners were personally involved in the removal of Sarah Tenenbaum. The individuals who were personally involved – caseworker Veronica James and supervisor Nat Williams – are not part of the case. The Second Circuit ruled that both of them were entitled to qualified immunity because the law was not clearly established at the time. (A22)

The only remaining claims are plaintiffs' claims that the City and its Commissioners had an unconstitutional policy or practice of removing children from their parents without providing pre-deprivation hearings, and that the City implemented that policy routinely, whether or not the City had sufficient time to provide a pre-deprivation hearing, i.e., time to go to court and seek a court order to

remove the children. The Second Circuit found that policy or practice to be unconstitutional. (A24)

The Second Circuit's decision is consistent with clearly established law. This Court has repeatedly upheld the requirement that the state provide notice and an opportunity to be heard when it seeks to interfere with the parent-child relationship. Thus, in *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), this Court held: "parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." And in *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982), this Court likewise held: "When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

Nor is there a split in the circuits. On the contrary, the Courts of Appeals which have considered the question have all held that "a parent has a liberty interest in familial association and privacy that cannot be violated without adequate pre-deprivation procedures." *Malik v. Arapahoe County Department of Social Services*, 191 F.3d 1306, 1315 (10th Cir. 1999). Accord, *Wallis v. Spencer*, 202 F.3d 1126, 1137 (9th Cir. 2000): "the Fourteenth Amendment[ ] guarantee[s] that parents and children will not be separated by the state without due process of law except in an emergency"; *Croft v. Westmoreland County*, 103 F.3d 1123, 1125 (3rd Cir. 1997): "The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process"; *Morris v. Dearborne*, 181 F.3d 657, 669 n. 7 (5th Cir. 1999); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 200 (6th Cir. 1987): "plaintiff's interest

in the physical custody of her children could not be terminated without compliance with the requirements of due process"; *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994): "Where the state seeks to interfere with . . . parental rights, its action must satisfy the procedural strictures of the Due Process Clause."

In this Court, Petitioners do not challenge the Second Circuit's ruling that their policy was unconstitutional. Instead, Petitioners claim that their employees reasonably believed that the situation involving Sarah was an emergency, thus justifying their failure to provide Sarah and her parents with pre-deprivation hearing. (P21)

The Tenenbaums agree that, in emergency situations where there is not sufficient time to provide a pre-deprivation hearing, the State may satisfy requirements of procedural due process by providing a prompt post-deprivation hearing. See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1976). However, that issue is not before this Court. Petitioners have already conceded that their employees had sufficient time to provide the Tenenbaums with due process of law. (A11 n7) The claim now set out in the petition for certiorari that those employees lacked sufficient time to seek a court order was not raised below, and is consequently not appropriate for review by this Court. Their decision to remove Sarah, which was made on Monday but not implemented until Tuesday, gave them sufficient time to go to court to seek an order. (A19)

Petitioners curiously assert that "[i]t is disingeuous of the majority in the Court of Appeals to suggest that the decision [to remove Sarah] could have or should have been made on Monday." (P21) The Second Circuit did not

"suggest" that Petitioners could have or should have decided to remove Sarah on Monday. Rather, the Court found that the evidence would support the conclusion that Petitioners' employee Nat Williams actually did make the removal decision on Monday. (A10)

Petitioners have already admitted that removing children without orders was their standard practice. At oral argument in the Second Circuit, counsel for Petitioners stated categorically that their caseworkers "do it routinely. That is the policy." (A11)

Although they fail to raise their key argument explicitly, what Petitioners implicitly seem to be claiming is that they should never have to provide due process of law in connection with the removal of children from parents, i.e., that they should not have to provide either pre-deprivation hearings or post-deprivation hearings. The suggestion of that position is contained in Petitioners' statement that "[i]t falls upon the child welfare workers to effectuate the appropriate balance between these competing interests [of upholding the constitutionally protected interest in the family relationship and of protecting children from abusive parents]." (P20-21)

Respondents submit that striking an appropriate balance between competing interests is not an appropriate function of a child welfare worker. On the contrary, that is the basic function of the judiciary, the end toward which due process of law strives. Due process of law, in the form of notice and an opportunity to be heard, guarantees that such a decision will be made by a neutral magistrate, upon consideration of all relevant facts and

arguments. See, *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

2. The search of Sarah Tenenbaum's body

Petitioners' second question is based upon the purported factual premise that the medical examination of Sarah Tenenbaum was "objectively medically indicated." The facts of the case are to the contrary.

The District Court found that "[i]t is undisputed that the sole purpose of the examination was to determine whether sexual abuse had occurred. No claim has been advanced, directly or indirectly, that the examination was related to necessary medical care or treatment of the child following assumption of custody by the Child Welfare Administration." (A101) Indeed, Petitioners themselves acknowledged that they ordered an examination of Sarah Tenenbaum solely for investigative purposes, not for medical purposes. They stated categorically that "[t]he medical examination conducted at the request of CWA was for investigative purposes to determine if Sarah had been sexually abused; it was not conducted to provide her with medical treatment." (Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 23, reproduced in Supplemental Appendix to the Second Circuit, p. SA-24)

With regard to the medical examination of Sarah Tenenbaum, as with the removal of Sarah from her parents, Petitioners do not claim that there is a split among the circuits. Rather, Petitioners appear to be claiming that

the Second Circuit decision conflicted with a prior decision of the circuit, *van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990). (Petitioners incorrectly assert that *van Emrik* was a decision by "this Court." (P24, P30)) Thus, Petitioners assert that the Second Circuit should have distinguished *van Emrik* instead of adhering to it. (P26, P30)

The alleged failure of a court of appeals to follow its own precedents is not a basis for review by this Court. See, e.g., *Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, the Second Circuit declined to grant en banc review of the instant action. (A126) In so doing, the Second Circuit implicitly indicated that it did not consider its decision in the instant case to conflict with its prior decision in *van Emrik*.

Petitioners argue, at length, that it was "reasonable" for Nat Williams to remove Sarah Tenenbaum and subject her to an intrusive medical examination. (P21-23) Those claim is not properly before this Court.

In arguing that an individual defendant acted reasonably, the Petitioners are in fact alleging that Williams is entitled to qualified immunity from liability. See, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Williams, who is not a Petitioner in this Court, has already been found by the District Court and the Court of Appeals to have qualified immunity. (A88, A40-41) Because the Court of Appeals found that the law was not clearly established, the Court did not reach the question of whether Williams' actions were objectively reasonable. As Williams is not a

Petitioner here, the reasonableness of his actions is not before this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CAROLYN A. KUBITSCHEK
LANSNER & KUBITSCHEK
Counsel of Record for Respondents
325 Broadway, Suite 201
New York, New York 10007
(212) 349-0900